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POSITION OF FOREIGN STATES BEFORE GERMAN COURTS

BY
ELEANOR WYLLYS ALLEN, PH.D.

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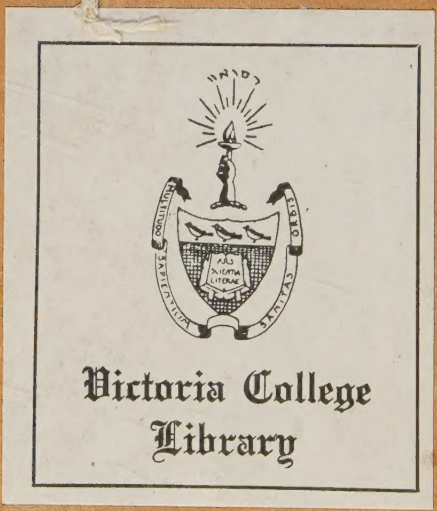

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THE POSITION OF FOREIGN STATES BEFORE GERMAN COURTS

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PREFACE

THE following study on the position of foreign states before German courts was prepared under the auspices of the Bureau of International Research of Harvard University and Radcliffe College. It comprises one of a series of similar studies which will be combined to form a general treatise on the subject.

The bibliography, so far from being comprehensive, is only a list of the more important works to which reference is made —often in abbreviated form—in the text. It is further limited to German material, leaving to subsequent studies the treatment of their respective literature.

E. W. A.

Cambridge, Massachusetts,
June, 1927.

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INTRODUCTION

A STUDY of the position of foreign states before domestic courts is particularly interesting in the case of Germany. Within the span of a single life-time, principalities and kingdoms with well-developed legal traditions were welded into an empire, which, for nearly fifty years, was famous for its paternalistic propensities. Then at the very apogee of state activity this government was overthrown, and a federation of republics established. Would those political changes be reflected in changing legal principles?

Moreover, a new sort of foreign state activity—government-owned merchant marines—sprang up to face this young federation just as it had thrown off the military bureaucracy which had so long enforced respect for all things of state. Would the old traditions be extended to the new situation, or would its very newness be used as an excuse to undermine the former teachings? What of the strong socialistic influences making themselves felt with peculiar force in Germany due to its proximity to Russia?

Such are some of the general considerations underlying the investigation undertaken in the following pages.

No attempt has been made to observe any chronological limitation in dealing with the status of foreign sovereigns before *German* courts. Despite the fact that the Holy Roman Empire did not cease to exist until 1806, and that between then and the establishment of the German Empire in 1871, the Confederation of the Rhine (1806-1813), the German Confederation (1815-1866) and the North German Confederation (1866-1870) intervened, these landmarks in the political development of Germany were not regarded as barriers in the study of this particular legal principle. So long as there has been reasonable continuity of identity in any of the component parts of modern Germany, the historical devel-

opment of the doctrine of immunity in that land has been extended as far back as it seems to serve a useful purpose, notwithstanding the fact that the territory in question may at that time have formed part of a different political entity. Thus Prussia has been considered as distinctly German while it was yet a member of the Holy Roman Empire dominated by Austria, and its Judiciary Act of July 6, 1793, has been examined as essential to a complete understanding of the most recent decision of the supreme court of the German Republic.

For the better understanding of the actual decisions analyzed, a brief outline of the judicial system in Germany is appended. Exclusive of the many special courts, the ordinary courts may be classified as follows:

1. *Amtsgericht,* presided over by a single judge, with competence in civil matters involving small amounts. It also sits as:
2. *Schöffengericht,*[1] a criminal court of first instance with jurisdiction over certain misdemeanors.
3. *Landgericht,* with civil and criminal chambers in which appeals from Amtsgerichte and Schöffengerichte, respectively, are heard. The court has original jurisdiction in all civil cases not given to Amtsgerichte, and its decision is final in certain classes of cases. Chambers for commercial matters may be established within the Landgerichte.
4. *Oberlandesgericht,* called *Kammergericht* in Prussia, with civil and criminal chambers, each of which sits with five members, including the president, and hears appeals from the Landgerichte.
5. *Oberstes Landgericht,* in Bavaria only, to hear a portion of the appeals which in other states go directly to the Reichsgericht.
6. *Reichsgericht,* whose members were appointed by the Kaiser (now by the President) on nomination by the Bundesrat (now by the Reichsrat). The civil and criminal chambers sit with seven members each, to decide appeals from the Oberlandesgerichte.
7. Special administrative courts, for patents, insurance, etc., but no general administrative court. Such a court seems to be contemplated by the Constitution of 1919,[2] but has not yet been established.

[1] Sheriff's court.
[2] Articles 31, 66.

8. State Courts of Conflict, which decide whether a matter is within the competence of the judiciary or of the administrative authorities.
9. *Staatsgerichtshof*, a new court to decide constitutional questions, established by § 108 of the Constitution of 1919. The Staatsgerichtshof, although an independent court, is established for some purposes in connection with the Reichsgericht and for others with the Reichsverwaltungsgericht.[1] Until the latter is established, the connection is only with the Reichsgericht.

[1] General administrative tribunal.

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THE POSITION OF FOREIGN STATES BEFORE GERMAN COURTS

THE POSITION OF FOREIGN STATES BEFORE GERMAN COURTS

CHAPTER I

HISTORICAL DEVELOPMENT

THE generally recognized principle of international law that a sovereign state may not be subjected against its will to the jurisdiction of a foreign court, and that its property is not liable to be attached or to be taken on execution has received very broad application in Germany. Although it owes its more liberal interpretation to recent times, the principle itself has found frequent expression not only under the Empire, but before that in the original German states.

Prussian Doctrine of Immunity

The development of the doctrine may well be traced through the medium of Prussian laws and decisions. The General Statute Governing the Administration of Justice in the Prussian States,[1] July 6, 1793, dealt at length with arrest and attachment,[2] and provided (§ 76) that when personal arrest was exercised upon a foreigner of rank, the Department of Foreign Affairs must be notified.

General Statute 1793

Order in Council 1795

An order in council of April 14, 1795, specifically stated that princes of the German Reich were not subject to arrest, and that other princes might not be arrested without the previous decision of the cabinet ministers on the point.[3]

Declaration 1798

The Declaration of September 24, 1798, in elucidation of such rules of the above-mentioned General Statute as applied to the relations of Prussia with foreign powers was more explicit. It reiterated the immunity from arrest enjoyed by

[1] Allgemeine Gerichtsordnung für die Preussischen Staaten.
[2] *Idem*, Pt. I, Tit. 29.
[3] Kabinetsordre, April 14, 1795, Sammlung Preussischer Gesetze (Rabe) III, 50, 52.

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ruling German princes of the Reich, but stated specifically that other—foreign—princes were subject to arrest.[1] This had been implied in the previous provisions, but it found here its first categorical expression.

General Statute 1815

In 1815 it became necessary to reënact the General Statute, both on account of the recovery of former German provinces, and because of the many changes and new interpretations given the act since 1793.[2] The new version contained more specific provision on the subject. Foreign princes were again expressly declared to be subject to arrest. Now, however, it was the Minister of Justice who must previously be informed of such an intention, and who must confer with the Minister of Foreign Affairs before giving his opinion on the propriety of the proceeding.[3]

It is obvious that these regulations of Prussia, while proclaiming the liability of foreign potentates to personal arrest and attachment of property,[4] at the same time withdraw that liability from judicial cognizance. It was the Minister of Foreign Affairs, the man most competent in questions of international law, who virtually decided the issue. The Minister of Justice communicated this decision to the court seized with the question, and the latter might be constrained to renounce a most potent agency in seeing justice done.

[1] Declaration, September 24, 1798, Pt. XI, § 5. *Ibid.*, V, 212.

[2] Patent zur Publikation, February 4, 1815, Allgemeine Gerichtsordnung für die Preussischen Staaten, Berlin, 1885, Pt. I, p. iii; Gesetz-Sammlung für die Königlich-Preussische Staaten, 1815, No. 5.

[3] Allgemeine Gerichtsordnung für die Preussischen Staaten, Berlin, 1885, Pt. I, Tit. 29, § 90, Annex 202.

[4] The provisions regarding the "arrest" of foreign princes were applied by the courts to the attachment of property as well. See for instance the decision of the Prussian Court of Conflicts, January 14, 1882. (Zeitschrift für Internationales Privat- und Oeffentliches Recht, XVI [1906], 262, 273). For further discussion of the meaning and significance of these provisions, see *idem,* June 25, 1910. (Zeitschrift für Internationales Recht, XX [1910], 416, 440.) Fischer in his opinion on the Hellfeld Affair (Abhandlungen aus dem Staats- und Verwaltungsrecht, Heft 23, p. 87), holds these provisions applicable to seizure on execution as well as to attachment. Fleischmann, on the other hand, more logically concludes from the position of the text in the Statute, that its application is restricted to attachments. He admits that the word "prince" in the original may be applied to the modern "state," and apparently assumes that it refers to the "arrest" of property as well as of the person. (*Ibid.*, p. 119.)

In view of the disinclination specifically to include in a national enactment principles recognized by the law of nations, which has been evidenced more recently, it seems at least doubtful whether the original omission of any mention of immunity for foreign princes was intended to be interpreted as though the converse had been stipulated. However this may be, whereas the method outlined was followed in practice, the *principle* seems not to have been influenced by the assertion of the statutes, but to have been decided on the basis of international law, and with a result quite contrary to the implication of the domestic enactments.

Decision of Prussian Court 1819

In 1819, on the demand of a German merchant, the Kreis Court in Saarbrüken, in the Rhenish Provinces, ordered the garnishment of certain funds of the Government of Nassau, which were in the hands of a third party. The court requested the Minister of Foreign Affairs to notify the Government of Nassau of the attachment. This he refused to do, writing to the Minister of Justice that he would take no hand in the matter. He said it was questionable whether the courts had the power to attach the property of foreign governments on the demand of a private citizen. In the provinces where the law of the realm and the General Statute applied, no court would think of so doing. The principle of immunity was a general one. It formed a part of international law and hence was applicable alike to Prussia and to the Rhenish Provinces.

Thereupon, the Minister of Justice, on October 5, 1819, wrote to the Advocate-General of the Court of Appeal in Cologne that whereas the exercise of jurisdiction over foreign governments was not consonant with international-law maxims as they had developed; and whereas the Prussian government would not brook such an action against itself, thereby recognizing it as in contradiction with the law of nations; and whereas the consistent application of a contrary principle might lead to many conflicts and much confusion, he was instructed to cause the property to be released, and to see to it that it be involved in no further judicial process. Furthermore, he was to intimate to the authorities in the Rhenish Provinces that in future no such attachments were to be permitted where foreign governments were involved, nor was any

jurisdiction to be exercised in such cases. If the courts were applied to for relief, the Minister of Justice was to be communicated with.[1]

Decision of Prussian Court 1832

An interesting question arose as to the effect of this procedure upon the character of the claim. Did it cease to be a private claim when it ceased being justiciable? In 1832 a claim for damages was brought against the Russian Government by a Prussian merchant, and seizure of Russian Government property in Thorn was demanded as security. A minority of the Superior Court before which the case was argued was of the opinion that the matter should be dismissed for want of jurisdiction. It was submitted that inasmuch as a decision in favor of the plaintiff could not be executed, the claim ceased to be a judicial matter and became an affair of state, such that the plaintiff could only pursue his claim through diplomatic channels. The majority held that the question was of a judicial nature, but its settlement was subservient to political policy.

The Minister of Justice, appealed to for advice, reported March 15, 1832, that as the result of his conference with the Minister of Foreign Affairs, it appeared that the claim could not be considered for want of jurisdiction. No property of a foreign sovereign government, whatever the reason for its being in the country, could be attached except under special circumstances recognized by international law. In case the merchant failed through his own efforts to get at least compensation for his actual damages, the Minister of Foreign Affairs stood ready to take the matter up diplomatically with the foreign government.[2]

Prussian Order in Council 1835

A few years later, the act of the Superior Court in Paderborn in seizing funds belonging to the government of the Electorate of Hesse, resulted in the promulgation of an order in council of April 9, 1835, to the effect that such action of the Superior Court would not be permissible even by way of retaliation. The basis of the suit was a claim for damages resulting from an act of the Elector of Hesse in his public

[1] Droop, Gruchots Beiträge zur Erläuterung des Deutschen Rechts, XXVI (1882), 289, 292.

[2] *Ibid.*, XXVI (1882), 293.

capacity. The acts of a sovereign when exercising his powers as such were not subject to review or judgment by courts of a foreign state, for the reason that the sovereign could not recognize the authority of the foreign court, and could only regard its interference as an act of force or as indicating a state of war. The illegality of the procedure of the Oberlandesgericht in Paderborn was obvious from this statement of facts.

From these examples, it appears that it was a well-established principle that the property of foreign sovereigns and governments was not subject to judicial attachment in Prussia, despite the apparent license contained in its General Statute Governing the Administration of Justice.[1]

Imperial Legislation 1879

On October 1, 1879, the imperial legislation came into force —the Organic Law for the Judiciary [2] of January 27, 1877, and the Code for Civil Procedure [3] of January 30, 1877. The general question of arrest and attachment, dealt with in title 29 of part I of the Prussian General Statute, was covered by § 5 of book VIII of the Code for Civil Procedure of the Reich.

Diplomatic Immunities

As in the original version of the Prussian Law, no specific mention was made of the liability to judicial process of foreign sovereigns or governments. Furthermore, in the imperial law, no suggestion was made as to the course to be followed when it was desired to practise "arrest" against a foreign sovereign.

On the other hand, the Organic Law enumerated certain classes of persons who were not subject to the jurisdiction of domestic courts. Thus, except in civil litigation over real property, members of foreign diplomatic missions accredited to the German Reich or to its component states enjoyed immunity from the jurisdiction of the courts of the country to which they were accredited. Members of the family and the

[1] See statement of de Paepe, Études sur la Compétence Civile (1894), p. 49; Kohler, Zeitschrift für Völkerrecht, IV (1904), 314. The same principle seems to have obtained in other German states. See, for instance, *Pfeiffer* v. *Fürsten zu Waldeck,* Oberappellationsgericht zu Cassel, January 17, 1818, Strippelmann, Entscheidungen, III(1), 368; *Blocksche Erbe* v. *Waldecksche Rentkammer zu Arolsen, idem,* June 16, 1841, *ibid.,* III(1), 369.

[2] Gerichtsverfassungsgesetz.

[3] Zivilprozessordnung.

personnel of such missions, in so far as they were not German, shared the same treatment.[1]

Acting under these new provisions, and apparently impressed with the exclusive character of the enumeration of the exemptions, to which interpretation color was given by the "motives" to the Organic Law,[2] German courts were called upon to decide claims which involved the determination of the question of their own competence. As the courts themselves had never been the agency through which this competence had been denied, and as the advisory opinion of the ministers was no longer prescribed, it is not surprising that the lower courts even of Prussia should now arrogate to themselves this competence.

In March, 1881, an engineer in Berlin, by the name of Ziemer, who held obligations of the Roumanian state railway, in connection with which he was bringing claim against the Roumanian Government, applied to the local court for a decree of attachment against certain funds of that Government in two banking houses in Berlin as security for the execution of the judgment if in his favor. This decree was issued, but was later vacated upon the suggestion of the garnishees that the attachment of foreign government property was not permissible.

Application of German Code to Foreign Government

Ziemer, thereupon, appealed to the Landgericht. On March 29, 1881, the attachment of the funds was again ordered, the court relying upon the provision of the Code for Civil Procedure which permitted persons having no domicile in Germany to be cited before the court in whose jurisdiction one of the latter's creditors might reside. This provision was held to apply to all juridical persons including foreign governments; moreover, the laws regulating judicial procedure were held to extend to foreign sovereigns and states, since the latter were not exempted by § 18 of the Organic Law for the Judiciary.

Against this decision, the directors of the banks in question made protest, but before the issue could be taken up by the

[1] Gerichtsverfassungsgesetz, §§ 18-20.

[2] Entwurf eines Gerichts-Verfassungs-Gesetzes für das Deutsche Reich mit Motiven und Anlagen, § 9.

court, Bismarck, as Prussian Minister of Foreign Affairs, interposed, and raised the question of the competence of the court. This case of conflict of jurisdiction—between the judicial courts and the administrative authorities—was brought before the Court of Conflicts in Berlin.

Prussian Court of Conflicts 1882

In a decision of January 14, 1882, this court held that the question to be decided by it was whether the courts were competent for the vindication of such a claim against a foreign government involving the attachment of movable property, or whether the relief sought could be granted not through the courts, but only through administrative means, *i.e.* diplomatic channels. The Minister of Foreign Affairs had contended that a foreign government could not be sued in Germany, and that the only domestic authority which could take up a claim against such a government was his Ministry. He based this contention upon international theory and practice, particularly the three Prussian decisions dealt with above. In other words, the Minister claimed that the courts had trespassed upon his domain, he being the head of the administrative authorities.

The court held that this was sufficient ground for raising the issue of conflict of competence, but it went on record as saying that the justification for so doing was not conditioned upon the right of the minister raising it to decide upon the facts of the original case. The effect of raising this issue was simply to remove from the ordinary courts the right of deciding on the admissibility of the judicial process, and to transfer the case to the Court of Conflicts for the decision of this point alone.

The Court of Conflicts decided, in conformity with the contention of the Minister of Foreign Affairs, that it was a fixed principle of international law that a foreign state was not subject to the courts of another country. This principle, deduced from the theory of the mutual independence of states and necessitated by considerations of international intercourse, had recently attained general recognition among the states of the family of nations. Despite certain exceptions to immunity from foreign jurisdiction, there were no exceptions to the immunity of property from seizure. In view of the position uniformly assumed by the Prussian authorities, the conclusion was inevitable that the principle recognized in other countries

held for Prussia, too, although not incorporated in any positive rule of law.

As for the rules of domestic law which were relied on to prove the contrary, they had no application to foreign *states*. The provision that legal claims might be brought against the government of Prussia or of other German states in no wise implied that similar actions were permissible against non-German states especially when its application would involve a conflict with well-established principles of international law.

Nor were the omissions in the law more significant. The express exemption prescribed for ambassadors was an exception to the general rule that all *persons* in Germany were subject to German courts. It by no means implied the subjection of foreign states and their governments. There was no need for an explicit rule of municipal law that general principles of international law were not to be infringed; they were axiomatic. The decree of attachment was declared inadmissible. The claimant could look only to the Minister of Foreign Affairs.[1]

Bavarian Court of Conflicts 1885

In a somewhat similar case in Munich, the Bavarian Court of Conflicts, in a judgment of March 4, 1885, held that there was no ground for raising the issue of conflict of competence. It decided that whereas, in general, property of a foreign government was not subject to seizure, a state might voluntarily submit to the jurisdiction of foreign courts, particularly in matters arising from quasi-private relationships. In this case, rolling stock of an Austrian railway had been ordered seized in execution of a judgment of a commercial tribunal directing payment of interest on bonds issued by the company, due to a German national. In the meantime, the Austrian government had purchased the railway, and the Minister of Foreign Affairs raised the question of the competence of the tribunal. The court of conflicts held that in purchasing the railway, and *in expressly assuming the position of legal successor to the company as regarded this case, then pending,*

[1] Text in Stenographische Berichten über die Verhandlungen des Reichstags, 1884/1885, Vol. VII, Appendix, p. 1925 *et seq;* Justiz-Ministerial Blatt, 1905, p. 202; Loening, Gerichtsbarkeit, p. 35; Droop, Gruchots Beiträge, XXVI (1882), 294-303; de Paepe, Études (1894), p. 49.

the government had voluntarily submitted to the jurisdiction of the foreign court in so far as the company itself was subject thereto. And it was well known that such voluntary submission on the part of the state was admissible as regarded its private relationships.[1] This case is variously held to support and to run counter to the case decided by the Prussian Court of Conflicts above.[2] The significance of the case as apparently permitting a seizure on execution as distinguished from an attachment is nullified by the fact that the court evidently assumed that the voluntary submission of the state covered the execution, because in this case the judgment had been delivered and the plaintiff had become entitled to execution before the state succeeded to the position of the railway company.

Reichsgericht 1884

On April 30, 1884, the Reichsgericht had occasion to decide on appeal a case involving the attachment of real property of the Republic of Peru. This order of attachment had issued from the Landgericht of Hamburg, but was later vacated upon the suggestion of the Consul-General of Peru, as not being permissible against property of a foreign state. An appeal before the Superior Court failed, but the right of the Consul-General of Peru to represent his country being denied by the Reichsgericht, in view of the peculiar circumstances of the case, the decision of the court below was reversed.[3]

Proposed Amendment to Judiciary Act, 1885

Thus in the space of five years, after the coming into force of the new law, property of Roumania, Austria, and Peru had been seized by order of German courts. These states made representations to the German Foreign Office on this score,[4] with the result that the Government was anxious to settle the matter once for all, in such a way as to leave no doubt as to its position. On January 18, 1885, the Federal Council presented to the Reichstag an amendment to the Judiciary Act—§ 17a—in the form of a bill denying to German courts all jurisdiction over foreign states or sovereigns.

[1] Text in Gesetz- und Verordnungs-Blatt für das Königreich Bayern, 1885, Beilage I; Annalen des Deutschen Reichs, 1885, p. 325.

[2] See de Paepe, Études (1894), p. 50; Loening, Gerichtsbarkeit, p. 39.

[3] Entscheidungen des Reichsgerichts in Zivilsachen, XIV (1884), 430.

[4] Loening, Gerichtsbarkeit, p. 40.

Article 1 of this bill was to the effect that "States, not belonging to the German Empire, and the heads of these states, are not subject to the jurisdiction of German courts. This disposition applies to members of sovereign families as long as they reside within the German Empire in the suite of their chief. It applies also to persons in the suite of the head of a foreign state, and to his servants, in so far as they are not German." Article 2 expressly stated that the immunities provided for were subservient to the rule of the Code of Civil Procedure [1] whereby in claims arising in connection with real property, the court of the place in which the property was situated, had exclusive jurisdiction.[2]

The Reichstag nominated a committee of fourteen members to study and report upon this proposed amendment. A primary point to be considered was whether or not the suggestion was in conformity with the law of nations. Secondly, was the distinction attempted by the Bavarian Court of Conflicts (*supra*) between acts of a state undertaken as a sovereign authority, and those involving a quasi-private relationship to be considered in the application of the contemplated exemption? Finally, the question of the advisability of a new law was discussed. Admitting in general the desirability of legislative enactment on the subject, why should Germany take the initiative? It would commit her to a point of view which other states might not share. Moreover, even granting that the proposition reflected the present state of international law, what certainty was there that it would continue to do so? Was it not likely that the doctrine would be affected by the ever-increasing quasi-private relationships into which states were entering? Would it be wise to incorporate such a provision into a national law?

On the other hand, it was maintained that the number of cases where German courts had ignored the principle of the law of nations had increased lately and caused protests from foreign states, and that a rejection of the proposal might lead the courts to misinterpret the law of nations, especially as the "motives" to the Organic Law expressly said that no other

[1] Zivilprozessordnung, § 25.
[2] According to von Bar, Clunet (1885), 650.

exceptions than those mentioned were recognized by the law of the realm.[1]

Several amendments were proposed, one of them recognizing the possibility of a state voluntarily submitting to the jurisdiction of German courts. A government member in charge of the bill answering a question put to him in the House, said that the proposed law was not intended to exclude the possibility of such voluntary submission, but only to prevent a foreign state being subjected to such jurisdiction. It has been questioned whether such a contention could be maintained, in view of the categorical terms of the text.[2]

Rejection of Amendment

Actuated by such considerations as these, the committee to whom the bill had been confided, rejected it nine to four.[3] It is believed that this action did not amount to a denial of the principle of international law that foreign states are in general not subject to the jurisdiction of domestic courts.[4] The principle was admitted, but a municipal law incorporating it was deemed unnecessary, and the actual text proposed unwise.

Constitution of 1919

It was not until the appearance of the new Constitution of 1919 that any provision was incorporated into German law covering the status of foreign states. At this time it was done in terms which avoided the difficulties inherent in the proposal of 1884. On the other hand, it placed much more responsibility upon the courts, for it became necessary for them to interpret the law of nations. Article 4 of the Constitution for the German Reich provided that the generally recognized rules of international law have the force of constituent elements of German imperial law.[5]

[1] See Entwurf eines Gerichts-Verfassungs-Gesetzes für das Deutsche Reich mit Motiven und Anlagen, 1874, § 9.

[2] See von Bar, Clunet (1885), 650.

[3] Clunet (1885), 654.

[4] Decision of Prussian Court of Conflicts, June 14, 1902, Zeitschrift für Internationales Privat- und Oeffentliches Recht, XIII (1903), 397, 400; *Idem,* June 25, 1910, Zeitschrift für Internationales Recht, XX (1910), 416, 436; Deutsche Juristen-Zeitung, XV (1910), 808, 810; Loening, Gerichtsbarkeit, p. 43.

[5] Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts. Verfassung des deutschen Reiches [Giese], 7th ed., 1926.

Historical Development of Immunity in Practice. Attachment

Historically, then, immunity from personal arrest was the first privilege accorded by statute in Germany to foreign princes. This provision of the Prussian Gerichtsordnung was applied by the courts to the attachment of the property as well as to the arrest of the person of the prince, and to foreign states as well as to sovereigns. In all the early cases the attempted seizure was for security only, not in execution of a judgment already rendered. Strictly speaking, Prussian legislation made no provision whatever regarding the levy of an execution upon foreign state-owned property. It was neither authorized nor forbidden.

Taking on Execution

This question, like that of jurisdiction to hear a suit, was dealt with under the precepts of international law. As jurisdiction was in general not recognized, there could be no question of the execution of a judgment against a foreign state except under exceptional circumstances,—when the state had voluntarily submitted or had had a counter-claim brought against it in a suit which it had instituted as plaintiff. For the courts to recognize voluntary submission to seizure of property, it must be clear that the submission was intended to extend to interference with the property of the sovereign and not merely to the determination of rights against it. This was the point of the decision of the Bavarian Tribunal of Conflicts of March 4, 1885.[1] The Austrian government in purchasing a private railroad against which a judgment had been rendered upon which the plaintiff was then entitled to execution, expressly assumed the liabilities of the company in this cause. In permitting the execution of the decision on property of Austria, the court interpreted the submission of that government as intended to include just such a possibility. The decision may be wrong in point of fact, but it is not a precedent for the actual levy of execution against the will of a defendant state.

The adequacy and self-sufficiency of the plea of the immunity of the property itself is well illustrated by the case of *"L'Assari Tewfik,"* [2] where, despite the fact that the com-

[1] Loening, Gerichtsbarkeit, p. 39; Fleischmann, Beschlagnahme, p. 18.
[2] Zeitschrift für Internationales Privat- und Oeffentliches Recht, XIII (1903), 397, and *infra*, p. 26.

petence of the court that rendered the decision was not questioned, and notwithstanding the existence of other adequate grounds for ordering the release of machinery of a foreign war vessel, the superior court preferred to base its decree on the impossibility of legally seizing any property of a foreign state.

When the jurisdiction of the court to hear the suit is also in question—as in the case of a doubtful counter-claim—the issues may be confused although they are still properly distinct in law, the invalidity of the levy upon execution being quite different from the validity of the judgment.[1]

Freedom from Suit

The immunity of a foreign state from suit in Germany rested purely upon generally recognized principles of international law until the promulgation of the Constitution of 1919, the attempt to pass a specific enactment to this effect in 1885 having proved abortive. This precept found frequent expression even in the earliest cases—those referring to attachment or sequestration. The Minister appealed to, usually asserted in general terms this limitation of the jurisdiction of domestic courts. Later the courts themselves vacated orders of attachment on the ground that they had no jurisdiction over foreign states. The assertion of this immunity was not limited to occasions involving sequestration of property, but served to protect a sovereign power from being sued. Thus on June 21, 1888, the Reichsgericht declared in a case concerning foreign loans, that a foreign state could not be subjected to the jurisdiction of domestic courts,[2] and on December 8, 1893, the Kammergericht in Berlin in an appeal from the Amtsgericht, confirmed the latter in its dismissal of a suit brought against the Russian Government, on the ground that it had no jurisdiction over the defendant, a foreign state. The Superior Court said that this was in accordance with international law, was a well-known reason for refusing jurisdiction, and was to the point in the case at bar.[3]

[1] See the Hellfeld Case, Zeitschrift für Internationales Recht, XX (1910), 416; Deutsche Juristen-Zeitung, XV (1910), col. 808; American Journal of International Law, V (1911), 490, and *infra*, p. 8.

[2] Entscheidungen des Reichsgerichts in Zivilsachen, XXII (1889), 19.

[3] Seufferts Archiv, L (1895), 97.

CHAPTER II

ANALYSIS OF THE DOCTRINE OF IMMUNITY

In so far as immunity from suit and attachment of property is based not upon domestic enactment but directly upon international law, it is usually considered to result from the mutual independence and equality of sovereign states.[1] However fundamental such a conception may be, as a rule of law to apply to actual cases it has proved somewhat indefinite, with the result that a body of custom and precedent has grown up defining and modifying the application of the general principle in specific instances.

Exceptions

In the matter of jurisdiction, certain exceptions are commonly recognized.[2] In view of the intimate incorporation of real property with the domain of the state, due to its immovable nature, jurisdiction *in rem* over such property, *i.e.*, over questions of ownership, boundaries, partitions, possession, etc., is exclusively within the competence of the *forum rei sitae*.[3] Logically, the use of the word "exclusive" could be explained as limiting the choice of jurisdiction afforded the claimant.[4] It has, however, been projected into the realm of international relations. Thus § 20 of the Judiciary Act of 1877 specifically subjects the immunity of foreign ambassadors to the operation of this clause, and it is held that this provision is likewise controlling in suits involving foreign states.[5]

Real Property

[1] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 167; Prussian Court of Conflicts, June 25, 1910, Deutsche Juristen-Zeitung, XV (1910), col. 810; Kammergericht, February 19, 1919, Rechtsprechung der Oberlandesgericht, XXXVIII (1919), 227.

[2] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 167.

[3] Zivilprozessordnung, § 25.

[4] *Idem*, § 24.

[5] Prussian Court of Conflicts, January 14, 1882, Droop, Gruchots Beiträge, XXVI, 300; Reichsgericht, December 12, 1905, Entscheidungen des Reichsgerichts in Zivilsachen, LXII, 167; Prussian Court of Con-

Voluntary Submission

Another exception to the general immunity from domestic jurisdiction commonly admitted is the situation arising from the voluntary submission of a foreign state. Here there can be no question of any infringement of sovereign prerogative, since the foreign state acts of its own volition and does not have any jurisdiction imposed upon it from without. Although strictly such voluntary submission to the jurisdiction cannot take place until the jurisdiction is invoked, the expression of an intention to submit may be made in general terms to cover future contingencies, by announcement or by treaty,[1] or it may be made for a specific case with the parties to the litigation.[2] A general appearance in a pending suit without objection to the jurisdiction is equivalent to such submission.[3]

Interpretation of Submission

The courts interpret such submission strictly in favor of the foreign state. Thus in a contract of May 1, 1918, entered into by the Turkish Government with a German citizen for the supply of ice machines for a hospital, it was provided that the Amtsgericht in Berlin should be competent for all claims arising from this contract. In a decision of February 19, 1919, the Kammergericht in Berlin decided that the submission therein expressed did not extend to seizure, although this was demanded merely to secure fulfillment of the judgment.[4]

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flicts, June 25, 1910, Zeitschrift für Internationales Recht, XX (1910), 438; Prussian Kammergericht, February 19, 1919, Rechtsprechung der Oberlandesgerichte, XXXVIII (1919), 227; Reichsgericht, December 10, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), 277; Zeitschrift für Internationales Privat- und Strafrecht, III (1893), pp. 117 *et seq.*, 275 *et seq.;* Wilmowski and Levy, Civilprozessordnung mit Kommentar in Anmerkungen (1895), I, note 7 before § 12.

[1] *Cf.* the statement of the United States in regard to submission to the jurisdiction of foreign courts in suits *in rem* against Shipping Board vessels, *infra,* p. 38; the Russo-German treaty of May 6, 1921, by which the Russian Government agreed to submit to the jurisdiction of German courts in certain matters concerning the Russian nationalized merchant fleet (Reichsgesetzblatt, 1921, 929); the Austro-Bavarian treaty of March 18, 1829, by which Austrian courts were given competence for claims of Austrian subjects against the Bavarian state regarding the Bavarian forests in Salzburg.

[2] *Cf.* the agreement made by the Portuguese Government with Cadbury Bros. in the *Coimbra, infra,* p. 39; also Loening, Gerichtsbarkeit, p. 120.

[3] Loening, Gerichtsbarkeit, p. 128.

[4] Rechtsprechung der Oberlandesgerichte, XXXVIII (1919), 225; Niemeyers Zeitschrift für Internationales Recht, XXX (1923), 269.

A decision of the Prussian Court of Conflicts of November 13, 1920, was to the same effect.[1] An attempt was made to attach certain accounts of the Turkish government in Berlin banks to secure the payment of a claim alleged to be due on a transaction entered into between the claimant and the Turkish government during the war for the supply of military uniforms. The court held that even were the allegation of the plaintiff true that the Government had expressly agreed that a certain court in Berlin should be competent for litigation arising from the transaction, Prussian courts would not thereby acquire the right to attach its property or to employ other measures of compulsion.

On the other hand, the court found an express submission to the use of such measures in the fact that the Turkish purchasing agents in Berlin, to dispel any doubt as to their principal's capacity or willingness to pay, had deposited large sums in local banks which they told the dealers were specifically set aside for their security.[2]

Foreign State as Plaintiff

Voluntary submission to foreign jurisdiction is usually seen in the fact that a foreign state comes into a domestic tribunal as plaintiff in a suit. It has not unreasonably been remarked, however, that in such a case there is properly no question of any *submission,* the foreign state is rather *making use* of the local courts to further its own interests.[3]

Counter-Claims

This question assumes importance in connection with the admissability of counter-claims against a plaintiff state. For those who hold that commencing a suit involves no voluntary submission to the court, there can be no competence to hear counter-claims, since jurisdiction can only be acquired by a renunciation of the protective immunity. It is pointed out that such a situation is by no means anomalous, since it is entirely possible even in civil law that a court may be competent to hear a claim, but be incompetent to take cognizance of a counter-claim. This may happen for instance, if the latter is of a class concerning which exclusive jurisdiction

[1] Juristische Wochenschrift, L [2] (1921), 1478.
[2] See also Hellfeld Case, *infra,* p. 18.
[3] Kohler, Zeitschrift für Völkerrecht, IV (1910), 320 and 323.

has been given to a court other than the one in which the original suit is brought. If, therefore, a counter-claim may be thrown out because the wrong court is invoked, it must inevitably fail if the judiciary lacks competence entirely.[1]

It is possible, however, to interpret the fact that a foreign state brings suit in domestic courts, as a renunciation of immunity and a subjection to the jurisdiction of those courts. If this be granted, the question of the admissibility of counter-claims at once arises. Loening assumes that the state has voluntarily submitted itself to the jurisdiction of the foreign court, but that it is to be held to have done so only to the extent indicated, which naturally does not include any claims which may be made against it. So-called counter-claims are to him independent actions, and not simply an added means of defense placed at the disposal of the defendant. Proof of this is the fact that in counter-claims an effort is made, not to dispose of the claim of the plaintiff, but to make good a different claim against him.[2]

Neither of these two doctrines which disallow counter-claims is meant to exclude the defendant from any legitimate measure of defense, or to preclude the judgment of costs against an unsuccessful plaintiff state,[3] nor does it contemplate the separation of two parts of a transaction to the detriment of the defendant, such as would be involved in an examination of the fulfillment of an obligation to deliver goods without an investigation of the corresponding duty of payment.[4] On the other hand, they both denounce the point of view which permits a private claimant to take advantage of the voluntary presence of a foreign state before the courts of his country to prefer a claim which he would not otherwise be able to bring there.

From another point of view, however, if the use of a court by a foreign state amounts to a subjection to its jurisdiction,

[1] Kohler, Zeitschrift für Völkerrecht, IV (1910), 320-324.
[2] Loening, Gerichtsbarkeit, pp. 124, 128-130.
[3] Kohler, Zeitschrift für Völkerrecht, IV (1910), 322; Loening, Gerichtsbarkeit, pp. 125, 128, 129.
[4] Kohler, Zeitschrift für Völkerrecht, IV (1910), 321, 324.

a submission to counter-claims is implied,[1] but the question of what constitutes a counter-claim has proved a difficulty. What relation must it have to the original claim in order to be admissible?

Hellfeld Case 1910

This point was involved in a famous case, known as the Hellfeld affair. The trial of this case by various imperial courts and the attempted execution of the judgment by a Prussian court [2] caused a great stir, and resulted in extensive comment.[3]

During the Russo-Japanese war, in 1905, negotiations were entered into by the Russian Government with a German named Hellfeld for the delivery of certain guns by vessel to Port Arthur. In the meantime, Port Arthur fell, and the vessel proceeded to Tsingtau. Here certain difficulties having arisen about the delivery of the vessel and cargo, the Russian Government brought about the arrest of the vessel. In a suit in the imperial German court of Kiaochow in Tsingtau, claim for possession and ownership of the vessel and cargo was made. Thereupon, Hellfeld raised a counter-claim amounting to several million marks, based upon a contract for the supply of arms dating from the beginning of the year 1904.

This counter-claim was dismissed on November 22, 1906, for lack of jurisdiction in a case brought against a foreign government. On April 9, 1907, in an interlocutory decision, the German Consular Court at Shanghai reversed this opinion, and despite the formal objection of the Russian Government held that German courts were competent to hear this claim, on the ground that the Russian Government had submitted this entire transaction to the German courts by itself bringing

[1] Thus in the Project of the Institute of International Law at its Hamburg session, September, 1891, it was provided, article 2, § 1: "The only actions admissible against a foreign state are . . . (4) les actions pour lesquelles l'État étranger a expressément reconnu la compétence du tribunal. L'État étranger qui lui-même forme une demande devant un tribunal est réputé avoir reconnu la compétence du tribunal quant à la condamnation aux frais du procès et quant à une reconvention résultant de la même affaire qui est le sujet de la demande . . ." (Annuaire, XI, 436.)

[2] Deutsche Juristen-Zeitung, XV (1910), col. 808; Zeitschrift für Internationales Recht, XX (1910), 416; American Journal of International Law, V (1911), 490.

[3] Zeitschrift für Völkerrecht, IV (1910), 309-488.

suit in the matter. It remanded the claim for reconsideration and decision to the Kiaochow court.

After hearing the case on its merits the court of first instance rendered a decision on October 28, 1907, against the defendant in his counter-claim. This was based on certain irregularities in the matter of evidence.

From this decision appeal was taken to the Superior Court of Kiaochow, which, on July 7, 1909, annulled a certain decree regarding the admissibility of evidence, and reversed the foregoing decision. The matter was then returned to the court of first instance.

Before the resumption of the process, the Russian Government renewed its protest against the jurisdiction of a German court in the matter of the counter-claim, declaring that the Russian Government would consider any such decision in this matter as null and void. Notwithstanding this, on September 27, 1909, the court rendered a decision on the counter-claim against the Russian Government, and Hellfeld was later provided with a certificate empowering him to proceed to the execution of the judgment.

In consequence of this, Hellfeld got from the Amtsgericht in Berlin, on December 15, 1909, a decree of attachment against funds of the Russian Government in a banking house in Berlin. Thereupon, on the complaint of the Russian Government, the Prussian Minister of Foreign Affairs raised the issue of a conflict of competence. On December 29, 1909, he set forth in an official statement the following:

The court at Tsingtau had jurisdiction only if and so far as Russia had voluntarily submitted. In bringing a claim before domestic courts, a foreign government did not subject itself to any counter-claim that might be allowed by municipal law, but only to such as were purely in the nature of a defense against the original claim. When, on the contrary, independent claims of the defendant against the plaintiff were involved, they were to be dealt with in the same way as though they were the object of a separate process.

As regards the execution of this judgment in Berlin, the Minister pointed out that, granting that the decision of the Tsingtau court was binding so far as the Berlin court was

concerned, the latter was itself violating the principle of international law which forbade the judicial attachment of property of a foreign state within the national domain. Even in cases where claims against a foreign state were established by a judicial decision rendered under circumstances which admitted of such cognizance in international law, the creditor could not resort to a Prussian court for execution of the judgment in his favor. He could only apply to the Minister of Foreign Affairs, whose business it was to take up such claims against a foreign state.

In its decision of June 25, 1910,[1] the Prussian Court of Conflicts found it unnecessary to decide whether or not the Russian Government intended to submit to a counter-claim when it brought its suit against Hellfeld, and whether or not its subsequent conduct amounted to such a submission. Such submission, were it established, would not be tantamount to an expression of willingness to permit the execution of the decision, since this involved a far greater renunciation of sovereign prerogative. Nor was there, according to German law, any inseparable connection between a judgment and the execution thereof, such that the latter must follow upon the rendering of the former.

The court thus adopted the point of view of the Minister of Foreign Affairs that the execution of a judgment against a foreign state would still be illegal even if the decision itself were legal.[2] As there was no evidence of an express submission to the execution of the decision in the counter-claim, as on the contrary the Russian government had expressly protested against it, the order of attachment of the Amtsgericht was vacated.

The Russian Government requested an opinion of the international-law questions involved from several German jurists.[3]

[1] Zeitschrift für Internationales Recht, XX (1910), 430; Deutsche Juristen-Zeitung, XV (1910), col. 808; American Journal of International Law, V (1911), 490.

[2] *Contra,* Loening, Gerichtsbarkeit, pp. 92, *et seq.*

[3] See Gutachten of Meili, Laband, Zorn, Hatschek, Fischer, Fleischmann, v. Stengel, Brie, Triepel, Kohler, v. Seuffert, Bornhak, Freund, and Weiss in Dynovsky, Unzulässigkeit einer Zwangsvollstreckung gegen ausländische Staaten; of Kohler, Laband, Meili and v. Seuffert in Zeitschrift für Völkerrecht, IV (1910), 309-448; of Brie, Fischer and

The opinions present a very thorough discussion of the general principle of immunity, and of the exceptions to this principle ordinarily recognized. The specific question of the admissibility of counter-claims among these exceptions is dealt with exhaustively and the conclusion seems to be that the counter-claim, to be admitted, must bear a very close relation to the claim itself. As regards the seizure of property of a foreign state, any such proceeding is contrary to international law unless the foreign state has expressly assented not only to the jurisdiction of the court to hear the suit, but to the seizure as well.

Attempted Extension of Exceptions

The general principle of immunity being so firmly established, the efforts of persons with a claim against a foreign state have been directed in recent years to attempts to have further exceptions admitted. The higher courts, however, have held to the exceptions outlined above, and have not recognized special pleas whether of a nature applicable solely to the case under consideration, or of a more general character tending to exempt whole categories of cases from their time-honored immunity.

Dresden 1915

An interesting case involving an attempt of the former variety was decided by the Superior Court in Dresden, April 26, 1915.[1] Here, too, the Russian Government was concerned, and war furnished the background, but the problem was very different from the Hellfeld case. In the summer of 1914, there was held at Leipzig an international exposition. As the result of some work executed for the Russian Government in connection with its exhibit at this fair, the plaintiff in the present case brought a claim of some 11,400 marks against the Russian Government. The Landgericht at Leipzig held that German courts were not open to a plaintiff pursuing private claims against the Russian Government.

Effect of War on Immunity

The question as it appeared before the Superior Court in Dresden was whether the state of war then existing between Germany and Russia affected the Russian government's right

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Fleischmann in Abhandlungen aus dem Staats- und Verwaltungsrecht, Heft 23: Zwangsvollstreckung gegen fremde Staaten und Kompetenzkonflikt, im Anschluss an den Fall Hellfeld.

[1] Rechtsprechung der Oberlandesgerichte, XXXI (1915), 175.

to immunity. Did the existence of war, and certain alleged illegal acts of Russia in connection with the war relieve German courts from the observance of this general international-law principle? The German claimant contended that no rule of international law was binding on a state against whose interests a foreign state had violated rules of that law. The court held, however, that although it might be true that the outbreak of war suspended or otherwise limited the application of treaties not containing provisions to the contrary, such was not the case with general principles, like sovereignty, which rested on bases so axiomatic and so unaffected by war that they needed no substantiation by treaty to have binding force. The origin and the connotations of the legal principle of independence proved that the outbreak of war could not *ipso facto* abolish it. Nor did illegal acts of the enemy, such as were common knowledge in the present instance, absolve one from duties arising from international law. Even if the law were violated, it was not thereby annulled. The decision of the Leipzig court was therefore affirmed.

Effect of Treaty of Versailles

A peculiar turn was given the problem by the coming into force of the Treaty of Versailles, January 10, 1920, whereby former portions of Germany became foreign states as regarded the Reich. In Germany, claims may be preferred by private citizens against the state. On March 7, 1920, the Prussian Minister of Interior [1] issued a decree relative to such litigation pending in the courts of districts which had become non-German.[2] It was to the following effect: It is a principle of international law, which was considered binding up to the outbreak of the War, that no state can be forced into the courts of a foreign country, except in regard to immovable property, or when the state itself brings a suit and so submits to the jurisdiction of foreign courts. This principle has been recognized by German courts. Subject to these exceptions, litigation against the German Government, now pending in courts which have become non-German, therefore, cannot proceed. Government agents are instructed to bring this newly acquired incompetence to the attention of the courts in ques-

[1] Oeffentliche Arbeiten.
[2] Juristische Wochenschrift, XLIX (1920), 1011.

tion. Although according to the German laws governing judicial procedure, still in force in these districts, the courts themselves should declare their incompetence, based upon international law, yet it is better not to rely upon their so doing. Hence agents are instructed at least to submit a memorandum on the subject.

In the case of an action by a German company against the German Government originally brought in Danzig, and appealed to the proper court in Prussia before Danzig ceased to be a part of Prussia, the Imperial Court held that the court of second instance was competent to decide the appeal despite the intervening detachment of Danzig from the Reich. It was observed that to send the case to the court of appeal for Danzig—a foreign court—would be impossible as contrary to international law.[1]

Acts jure gestionis

In addition to special exemptions contended for under special circumstances, a well-organized and growing sentiment in Germany, as well as elsewhere, has favored the exemption of certain classes of litigation, which have become increasingly numerous in recent years. These are claims against a foreign state which arise in connection with a specific act or a general enterprise, undertaken by the state not in its exclusively sovereign capacity. Such acts are variously characterized as private acts, acts involving a relationship in private rather than public law, or acts which might have been done by a private individual. The essence of the attempted distinction seems clear, but definitions are unsatisfactory. It is difficult to conceive of a state as appearing in anything but its sovereign capacity. Even if it engages in business—acquires a monopoly, for instance—it does so with a public purpose. A contract of purchase may be a relationship of private law, but if a state contracts for the construction of a war vessel, or the purchase of arms, is it not acting in its public capacity?

However difficult the definitions or confused the distinction, it is a fact that the last fifty years have seen states entering into fields of endeavor not necessarily or traditionally connected with statecraft. Among these, the most important in

[1] Decision July 1, 1921, Entscheidungen des Reichsgerichts in Zivilsachen, CII (1921), 304-305.

its international effects has been the ownership of means of communication and transit. State railways and government-owned merchant fleets have assumed increasing importance in international relations.

There is a strong sentiment among writers, that there is no sound reason for withdrawing from the ordinary jurisdiction of the courts the vast numbers of claims which arise in connection with such enterprises.[1] Not only is an injustice done the claimants in such cases, but a mass of claims is diverted to diplomatic channels although they do not properly belong there.

However insistent the writers may be concerning the injustice, unreasonableness, and inexpediency of the exemption of this class of cases from the competence of the courts, German tribunals have refused to recognize any distinctions. When a foreign state or its property has been involved, the courts have refused their assistance to the claimant, whether the plea was based on a "public" or "private" act of the state.

Reichsgericht 1905

Perhaps the most famous case decided in this connection was that involving the Belgian State Railroad in which a decision was rendered December 12, 1905, by the Imperial Court.[2] In March, 1902, the Belgian company had contracted with a merchant in Antwerp for the delivery of some railroad ties. Difficulties arose in regard to the execution of this contract, and the plaintiff, a German subject, who had succeeded to the rights of the Belgian merchant, brought suit in the Amtsgericht in Aix to rescind the contract in so far as it remained executory, and to obtain payment for the ties already delivered. The defendant denied the jurisdiction of the German courts. This contention was sustained by the court of first instance, and also by the Superior Court in Cologne, both of which dismissed the suit for lack of jurisdiction. The decision was affirmed on appeal by the Imperial Court.

After agreeing with the court below that the question of immunity was regulated not by German law, but by international law, the court reviewed the whole doctrine. It pointed

[1] See Kohler, Zeitschrift für Völkerrecht, II (1908), 33.

[2] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 165; Journal des Tribunaux (Belges), 1906, 855.

out that there was general agreement in the literature on the subject that when acts of a foreign state were in question, the courts had no jurisdiction if the acts were undertaken in the exercise of sovereignty. No such agreement prevailed, however, when the state had acted only as a juridical person in the domain of private law.

On the other hand, the higher courts not only in Germany, but in the United States, England, Austria and France had almost without exception held that even in private-law matters, foreign states were immune from the jurisdiction of domestic courts. This resulted from the mutual independence and equality of sovereign states upon which international law was based. In affirming these decisions, the Reichsgericht remarked that if the foreign state could be compelled, even in private matters, to take justice from domestic courts, it would be subjected to the political authority of the national state, and would suffer the loss of its international independence.

The Court, while maintaining its lack of jurisdiction over a foreign state even in quasi-private relationships, made reference to the two usual exceptions to the immunity. In the case in hand, neither of them was applicable. Not only was there no reason to suppose tacit consent on the part of Belgium, since the whole business was located in Belgium, but the latter had immediately protested the jurisdiction. Nor did the court let itself be influenced by the fact that in recent years, Belgian courts had considered themselves competent in cases involving private acts of foreign states.[1]

Thus was the question settled as regarded foreign state-owned railways.

[1] Mention was made of the Limburg Railway case, decided June 11, 1903, Pasicrisie Belge, 1903-1-294; Weekblad van het Recht (1903), 7983, p. 3:2.

CHAPTER III

THE APPLICATION OF IMMUNITY TO GOVERNMENT-OWNED VESSELS

At the close of the World War, vast fleets of government-owned or operated vessels began to sail the seas on purely commercial ventures. With their appearance in this guise, all the arguments against immunity for governments or their agencies in carrying on non-political enterprises were renewed and redoubled. The large proportion of shipping claims which would be withdrawn from judicial settlement, the overwhelmingly private character of most claims against such vessels, etc., were pointed out by the advocates of jurisdiction. The courts, however, remained unmoved.

Status of War Vessels

Before going into the juridical status of government-owned merchant vessels, it may be well to call attention to the fact that the general principle of immunity from jurisdiction and arrest has always been applied to war vessels.[1] In such vessels is seen exemplified the sovereignty of the state whose flag they fly. Circumstances tending to mitigate this representative character of war vessels have not sufficed to prevent the courts from disclaiming competence. A single illustration will suffice.

Landgericht Kiel 1901

On July 18, 1901, the Landgericht at Kiel issued a decree authorizing levy of execution on property of the Turkish Government based on a judgment rendered on a contract of employment by a commercial court in Constantinople. It happened that two vessels of the Turkish Government, the *Ismir* and *l'Assari Tewfik,* were at a shipyard in Kiel harbor. The former was a transport, the latter a war vessel. *L'Assari Tewfik* was entirely dismantled, however, and its machinery had been removed for repairs. An attempt of the judgment creditor to seize this machinery under the above decree was

[1] For the classification of other public vessels and the assimilation of most of them to war vessels as regards immunities of various kinds, see Feine, Die Völkerrechtliche Stellung der Staatschiffe, Berlin, 1922.

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frustrated by the court itself. It held that *L'Assari Tewfik*, being a Turkish war vessel, was to be regarded during her stay in German waters as a portion of the Turkish state, and hence not subject to German jurisdiction. That which was true of the vessel was true of its parts, which were only temporarily out of the ship without being permanently withdrawn from their purpose. The Superior Court at Kiel on August 15, 1901, dismissed an appeal against this judgment. While basing its decision upon the ground that the property of a foreign state was not liable to seizure in Germany, it expressly stated that the release of the property was completely justified on the reasoning of the lower court.[1]

The status of government-owned merchant vessels seems not to have been adjudicated in Germany prior to the World War. Indeed, comparatively few such vessels were known. As a result of the war, however, many states had acquired merchant ships by confiscation or condemnation of enemy vessels, or by allocation from the Reparation Commission. In many instances these were quickly disposed of to private owners, but certain states continued to operate merchant lines. Among these were the United States, Portugal and Brazil. When such vessels became involved in litigation, the question was not whether they represented the sovereignty of the state, but whether they were entitled to the privileged treatment of other state property.

The "Schenectady" 1920

One of the earlier cases involving this class of vessels was the *Schenectady*.[2] This was a vessel operated by the Strachan Line of Savannah. The plaintiff on December 24, 1919, got a decree of attachment from the Landgericht in Bremen against the Strachan Line as represented by the captain of this steamer. He claimed the value of a hundred bales of cotton which should have been delivered to him as owner, but which the vessel failed to bring.

Under this decree, the vessel was seized. The captain objected that the vessel belonged to the United States of America, and hence was not subject to seizure. Bond having

[1] Zeitschrift für Internationales Privat- und Oeffentliches Recht, XIII (1903), 397.

[2] Hanseatische Gerichtszeitung (1921), com. pt., p. 76.

been given by a local bank, the plaintiffs released the vessel. Subsequently the court ordered that the writ of attachment be vacated as the vessel was not liable to seizure, being "ready to sail." The plaintiffs, interpreting this decree as tantamount to a denial of the legality of the writ of attachment when issued (which might render them liable in damages), appealed to have the writ declared legal from the beginning. This appeal failed. The Strachan Line, however, made no further attempt to have the United States made defendant to the action, and the Superior Court denied that it could do so even should it appear that the United States was the real owner of the vessel. The consequences to the plaintiffs of a writ of attachment against the United States and against the Strachan Line were very different. They no doubt wittingly brought the action against the latter, and the substitution of the United States would be very detrimental to them. According to the judgment of the Reichsgericht of December 12, 1905,[1] foreign states could not be sued in a German court even if they were engaging in commerce or shipping, and it was at least doubtful whether this international-law principle was without application to the case in hand merely because peace had not yet been concluded with the United States.[2]

The "Ice King" 1921

The first case in which the issue of the immunity of a government-owned merchant vessel was fairly presented was that of the *Ice King*, a United States Shipping Board vessel against which claims arose in connection with a collision which took place between it and the *Jonas Sell* in Dutch waters in the latter part of August, 1919.

Landgericht

The plaintiff brought suit in the Landgericht in Bremen, against the United States Shipping Board as the representative of the owner, the United States. The defendant objected to the jurisdiction of the court on the ground that, as the United States of America was the real defendant, German courts were not competent. The Court dismissed the objection.

[1] Entscheidungen des Reichsgerichts in Zivilsachen, LXII (1906), 165.

[2] See decision of Hamburg Oberlandesgericht, February 28, 1921, *infra*, p. 29.

The Oberlandesgericht at Hamburg in a decision of February 28, 1921,[1] reversed the decision of the lower court and dismissed the claim. Contention was made on the one hand that the United States was the real owner, and, on the other, that the United States had renounced any claim of immunity for such vessels by § 9 of the Shipping Act of 1916 [2] which provided that such vessels while employed solely as merchant vessels should be subject to all laws, regulations and liabilities governing merchant vessels. The court held that this act referred only to the application of American laws to Shipping Board vessels, and that no conclusion could be drawn from it regarding any intended renunciation of immunity abroad. Failing such a voluntary submission, it was established that German courts were not competent even in regard to questions of private law.

Oberlandesgericht

In declaring itself incompetent to entertain the suit, the court recognized the justice of the plaintiff's contention that there should be a difference in the treatment accorded vessels of state, used for public service, and those engaged in purely commercial enterprises. But however desirable such a distinction might be, it was not through the courts that its realization should be attempted.

The case was decided on appeal by the Imperial Court on December 10, 1921.[3] It affirmed the decision of the Oberlandesgericht. The United States of America was recognized as being the real defendant, represented by the United States Shipping Board. The decision of the Superior Court was admitted to be in conformity with the decision of the Imperial Court of December 12, 1905,[4] to the effect that a foreign state could not as a rule be brought before domestic courts even in matters involving purely private law.

Reichsgericht

That decision reflected the international law on the subject at that time. The problem therefore resolved itself into one of discovering whether anything had occurred since 1905, in connection with the World War, for instance, to alter the situ-

[1] Hanseatische Gerichtszeitung (1921), com. pt., p. 85; Revue Internationale du Droit Maritime, XXXIII (1922[1]), 868.

[2] 39 Stats. L. 728.

[3] Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), 274.

[4] *Ibid.*, LXIII (1906), 165; *supra*.

ation. The answer was no. The plaintiff contended that when a foreign state established an extensive business in the country, it thereby subjected itself to the domestic courts, at least as concerned this commercial or industrial undertaking and the movable property involved therein. This theory, sometimes maintained by text writers, more rarely in judicial decisions, had not been generally recognized in practice. If the authorities never conceded to merchant vessels extraterritoriality, that was because they were writing at a time when the exclusive use of a "public ship"—*i.e.* one the property of a sovereign state—for private purposes, especially for trading, was almost unknown. Hence, it was not permissible to draw the conclusion from these authorities that immunity was to be granted only to those foreign vessels used in whole or in part for public services. The question of restricting this immunity had been receiving more and more consideration, but it had not yet reached the point where the underlying principle of international law had been changed.

This principle still being that fundamentally, even in private relations, a foreign state was free from the jurisdiction of domestic courts, it only remained to see whether any special circumstance existed to make an exception of this case. As already observed, claims *in rem* for real estate might be brought in domestic courts even against a foreign state. It had been asserted by text writers that by analogy local courts were competent for the claims of a ship's creditor against a foreign state-owned vessel in national waters.

The court emphasized, however, that there was a great difference in the two situations. The soil, and objects inseparably connected therewith, formed an indivisible part of the national domain, against which only the local state was competent to execute a decision. Hence in German law this doctrine took precedence even over that of extraterritoriality as applied to ambassadors, etc. The foreign state acquiring real property in Germany reckoned with this situation of law and fact from the beginning. On the other hand, at least according to German law, neither taking jurisdiction over the claim of a ship's creditor nor executing a judgment in his favor, depended upon the presence of the vessel. Nor did such

a suit need to be merely *in rem;* in most cases the captain was personally liable as well. That is to say, if the plaintiff secured a favorable judgment, he might execute it not only on the vessel involved in the collision which was the subject of the present case, but on any other commercial vessel of the defendant, and that not only in Germany, but, under certain circumstances, outside of Germany as well. From the above, it was apparent that there was a sharp distinction between this sort of claim and that involving real property, which required a differentiation in their treatment as regarded the question of jurisdiction.

It only remained to consider, therefore, whether an exception could be deduced from the fact that the United States had voluntarily subjected itself to the jurisdiction of domestic courts. Despite its character as a sovereign state, the United States had acquired a large number of merchant vessels with which it engaged in international trade. In connection with this shipping business, it made use of special agents who maintained branches, among other places in Germany. Other states, notably Soviet Russia, had followed this example. Thus a new situation had arisen, new in that previously such undertakings were known to international trade only to a very modest degree.

Countless voices had been raised among jurists, merchants, and other interested parties, claiming that the state in carrying on a business of so considerable an extent and of a permanent nature in every way similar to a private enterprise had so far renounced its sovereign rights and placed itself on a parity with a private concern. It had, however, been shown that in general the establishment and maintenance in the country of a business agency by a foreign state was not tantamount to renunciation of sovereign immunity either in respect to controversies arising from this business, or in regard to its movable property. In particular was this true of means of transportation exploited by a foreign state within the country—motor bus lines, railways, and inland steamship lines.

It was not evident why there should be such a difference between undertakings of this sort and those of an ocean-going shipping company that participation in the latter should

be held to be a renunciation of extraterritoriality. Moreover, in the present case, the United States had expressly stated that it did not intend to renounce its sovereign privilege by its participation in international trade. The Suits in Admiralty Act of March 9, 1920, although enacted after the time of the collision giving rise to this case, even after the beginning of the process, was passed in view of the general enterprise here engaged in.[1] In § 7, the proper authorities were expressly directed to claim immunity from local jurisdiction in cases like the present. It was only after this provision for claiming exemption that further procedure before the local court—giving bond, etc.—was dealt with, in which connection it was expressly stated that "nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel . . . from foreign jurisdiction in a proper case."

Suits in Admiralty Act 1920

The provision of § 9 of the United States Shipping Act of September 7, 1916, to the effect that "such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels . . ." did not alter the above conclusion. It did not touch the question of extraterritoriality in its application to these vessels.

From all the above it resulted that the principle of international law by which immunity was accorded a foreign state was applicable to the present case. The objection that this constituted patent injustice to legitimate domestic shipping and commercial interests, and was not consonant with the requirements of sound international trade was not true—at least to the extent to which it was maintained. For the state which claimed the privilege of extraterritoriality for its merchant vessels must be prepared to have these vessels experience not only the advantages, but the disadvantages, which might be connected with such immunity. Thus the limitations customarily applied to warships and other vessels employed in strictly public service regarding entrance, length of stay, and traffic in a domestic port might be applied to them. Furthermore, since no state was bound to permit another state to

[1] 41 Stat. L. 525.

carry on a business upon its territory, it might be prescribed by legislation that the defendant or the United States be expressly subject to the jurisdiction of the local courts in all litigation arising in connection with business in the country. Finally the shipping business, due to its inherent elasticity, could without much difficulty overcome the economic disadvantages of this immunity which threatened national interests. This would probably result in furthering the efforts being made to adapt international law to the needs of international trade by the abolition of immunity for purely commercial vessels.

Comment on "Ice King"

This case aroused a great deal of comment. Dr. Gothard Brandis attacked the decision of the Superior Court with great earnestness.[1] He pointed out that if the German courts did not assume jurisdiction in such cases, the interested parties were left without any resource in claiming their rights. There was a theoretical possibility of bringing suit in the United States, but practically this was impossible, due to the enormous expense involved. Not only was the decision inequitable, but it was also wrong from the legal point of view. In § 9 of the Shipping Act of 1916 was to be found an express renunciation of any privilege so far as these vessels were concerned. An attempt was made to draw an analogy from the Brussels Convention of September 23, 1910, relative to assistance at sea, which exempted from the application of its terms, vessels of war and vessels of state used exclusively in public service, thus implying a fundamental distinction between such vessels and all others. Finally, Dr. Brandis adverted to the point that the court relied upon a principle drawn from international "comity". This he said was laughable, in view of the still existing state of war between the United States and Germany, which precluded any idea of "comity".

To this criticism, Dr. Stammann replied.[2] Neither the Shipping Act nor the Brussels Convention could be invoked against

[1] Hanseatische Gerichtszeitung (1921), com. pt., p. 87; Revue Internationale du Droit Maritime, XXXIII (1922[1]), 871.

[2] Hanseatische Gerichtszeitung (1921), com. pt., p. 109; Revue Internationale du Droit Maritime, XXXIII (1922[1]), 872.

the principle relied upon by the court. The Shipping Act was merely an American law which made the United States as a shipowner liable as a private shipowner, but did not say how this liability was to be established in a given case. It was the Suits in Admiralty Act of 1920 that gave these details, and, in addition, expressly stated that the United States in no wise renounced its right to claim immunity before foreign courts. It was impossible to construe the United States legislation as intending to renounce the privilege referred to. As for the Brussels Convention, because it limited the application of the rules therein laid down in regard to salvage and collision, it did not imply a renunciation of immunity from the jurisdiction of domestic courts in cases involving collision. States could not be interpreted as renouncing tacitly an immunity derived from their sovereignty.

Dr. Stammann, commenting on the alleged unfairness of the decision, said that if the Imperial Court came to the conclusion, on grounds of law and justice, that there was reason no longer to follow the judgment rendered by it December 12, 1905,[1] that decision would have to be respected, but let there not be invoked decisions based upon opportunism, or upon regard for the momentary interests of a small circle of persons.[2]

The "West Chatala" 1921

Before the case of the *Ice King* could be heard on appeal, another case involving a Shipping Board vessel came before the Oberlandesgericht at Hamburg. This was the *West Chatala,* decided April 20, 1921.[3] A grain-importing company of Berlin, alleging a claim for damages against the American Line as owners of the steamer *West Chatala,* secured an order of attachment from the Bremen court on February 22, 1921, and seized the steamer.

Oberlandesgericht

The United States, represented by the United States Shipping Board, intervened before the Superior Court at Hamburg, claiming that the vessel in question was not owned by the American Line, but by the United States of America, and could not be seized for an alleged claim against the former.

[1] See *supra,* p. 24.

[2] For a counter reply by Dr. Brandis, see Hanseatische Gerichtszeitung (1921), com. pt., p. 110.

[3] Hanseatische Gerichtszeitung (1921), com. pt., p. 137; Revue Internationale du Droit Maritime, XXXIV (1922[2]), 233.

Furthermore, as property of the United States, it was immune from the jurisdiction of German courts.

The court, while admitting the general principle of the immunity of foreign states from domestic jurisdiction, maintained that in this case that principle was not prejudiced by the attachment of the vessel. In the first place, the seizure was not directed against the United States, but against the American Line as temporary owner in the sense of the German Commercial Code.[1] A further justification for the competence of German courts in the matter was derived from the voluntary submission of the United States. The latter had undertaken an industrial enterprise, consisting in sending grain to Germany, not in its own name, but in that of its agents in Germany, known at its Hamburg branch as the American Line. A state so doing subjected itself *ipso facto* to the jurisdiction of the courts of the country where it exercised its industry. Hence, in the present case, the United States rendered itself answerable before the courts for actions instituted against the vessel by the recipients of the cargo.

Furthermore, an express submission to the jurisdiction of German courts was to be found in § 9 of the Shipping Act of 1916. The tribunal did not agree with the interpretation given this act by another chamber of the same court in the *Ice King*, according to which this enactment had only domestic significance. Nor was it possible to see in the Suits in Admiralty Act a rejection of this submission. For the very provision for furnishing security implied submission to the jurisdiction of the court to determine its amount.

Hence, the judge of first instance was concurred with in holding that the vessel was subject to the jurisdiction of domestic courts in regard to its liability for debts. There remained then to be seen whether the claim was well founded from the point of view of domestic law. The court referred to the provision of the Commercial Code,[2] according to which he who employed a vessel of which he was not the owner in a shipping business for his own account, was to be regarded as

[1] Article 510.
[2] *Ibid.*

the owner as against third parties. In such cases the actual owner might not intervene to prevent the enforcement of a proper claim against the vessel.

In order to justify the suit, it was only necessary to establish the fact that the American Line was exploiting the vessel "for its own account" and not as an agent. This the court did, and reached the conclusion that the seizure had been legally made and should be maintained.

Reichsgericht

In a judgment rendered on the same day as that in the *Ice King,* December 10, 1921,[1] the Imperial Court reversed this decision. It confined itself, however, to a consideration of the relationship existing between the United States and the American Line. Its conclusion that the latter was merely an agent of the former, and was not employing the vessel for its own account, sufficed to invalidate the decision of the lower court. It was not considered necessary to deal with the question of immunity, because the intervention of the United States was justified on the ground that its vessel had been seized under an order for attachment issued against another party.

In July, 1924, the United States attempted to get damages from the Superior Court at Hamburg against the grain-importing company for the illegal seizure of the *West Chatala.*[2] This was refused. The Court held that the defendant could not be accused of negligence in assuming that the American Line was using the *West Chatala* for its own account, since both it and the court below had shared that view. The lower court was correct in saying that one could not demand from the defendant, whose interests require immediate action, more care than that which had proved sufficient to two courts, after they had heard arguments of fact and of law presented by both sides, in determining that there was no legal obstacle in the way of carrying out the arrest.

Policy of United States

The policy adopted by the United States in these cases was not designed to avoid liability incurred in connection with Shipping Board vessels, as is evidenced by the fact that

[1] Entscheidungen des Reichsgerichts in Zivilsachen, CIII (1922), 280; Revue Internationale du Droit Maritime, XXXIV (1922[2]), 668.

[2] Hanseatische Gerichtszeitung (1924), com. pt., p. 256.

immediately after the decision in the *Ice King*, and the *West Chatala*, the United States attorneys were instructed to adjust the cases on their merits.[1]

Consular Stipulation

On May 4, 1922, the London office of the Shipping Board announced that it had carried the first case in Germany to the court of last resort solely for the purpose of establishing the principle of immunity, but that were immunity conceded and consular stipulations accepted for the release of United States vessels, the government would submit to the jurisdiction of German courts in those cases in which jurisdiction could be exercised over private carriers.[2] The "consular stipulation" referred to is an undertaking to appear in any case which may be brought against a Shipping Board vessel and to pay any claim established against it.[3]

This was suggested in lieu of a bank guaranty, usually required of foreign debtors before the release of a vessel can be effected. The advantage of the latter to the creditor is that he can raise money on it; the disadvantage to the United States, that it is a longer process and seems to question the credit of the government.

Whatever the technical grounds for the insistence upon immunity before German courts, and however punctilious the settlement of the issue out of court, the Shipping Board suf-

[1] See letter from Joseph E. Sheedy, Acting Vice-President in Charge of Operation, U.S.S.B.E.F.C., to Freund, July 11, 1922.

[2] Statement by N. A. Smyth, General Counsel U.S.S.B.E.F.C.

[3] Suggested form of stipulation:

In consideration of the release (or refraining from arrest) of the S.S. ....., the U.S.S.B. hereby undertakes to cause an appearance to be entered in the action which has been (or may be) commenced in the courts of ..... in respect of the claim of ..... for ..... And should it be impossible to adjust the claim amicably, the U.S.S.B. hereby undertakes to pay forthwith any claim which may be established against the S.S. ..... by final court judgment.

This guarantee is given unconditionally, but with the express understanding that it is *ex gratis*, and is not to be taken as a precedent should the U.S.S.B. desire to stand on its rights and object to the jurisdiction of the ..... courts in any future case where it is considered proper to do so.

THE UNITED STATES SHIPPING BOARD

By .....

fered much from hesitancy on the part of shippers who naturally believed that the special immunity granted its vessels would complicate claims that might subsequently arise.[1] Therefore there was a desire on all sides for an official statement of the position of the Shipping Board for use in Germany and in other foreign countries.[2] On June 3, 1922, the Shipping Board approved and adopted the following report of Commander Benson: "I recommend that the Board make it broadly known that in lieu of the arrest of the vessel in foreign countries it will concede jurisdiction to the courts there and will furnish bond to meet any final judgment obtained . . . not in excess of the value of the vessel." In October of the same year, A. D. Lasker, Chairman of the Shipping Board, said that the Board was heartily in favor of government-owned ships in commercial work being subject to all the laws that would cover private ownership.[3] Finally, on March 12, 1923, the diplomatic representatives of the United States were instructed substantially to the effect that the United States Shipping Board would not claim that ships operated by or for it, representing the United States of America, when engaged in commercial pursuits, were entitled to immunity from arrest or to other special advantages which were generally accorded to public vessels of a foreign nation. Such ships, when so operated, would be permitted to be subject to the laws of foreign countries which applied under otherwise like conditions to privately owned merchant ships foreign to such countries. The United States Shipping Board would, however, when occasion arose, continue to ask that foreign courts and tribunals, and other government departments and agencies recognize the application in respect to such vessels, of the provisions of §7 of the Suits in Admiralty Act, approved March 9, 1920.

Recommendation of Benson

Instructions to Diplomatic Agents

This voluntary submission to the jurisdiction of foreign courts applied only to suits *in rem* and was not applicable

[1] See letter of A. D. Lasker to Assistant Secretary of State Harrison, October 17, 1922.

[2] See statement of N. A. Smyth, General Counsel U.S.S.B.E.F.C., May 4, 1922.

[3] Communication to Assistant Secretary of State Harrison.

when the Shipping Board or the United States was sued *in personam* in connection with one of its vessels.[1]

The United States had thus aligned itself with the Canadian and Australian governments, which in regard to the liability of their government-owned liners to legal action for the recovery of claims of any nature voluntarily and unreservedly submitted to the ordinary jurisdiction of foreign courts and agreed to be held subject to the ordinary system of writ and arrest in precisely the same manner as any private owner.

The "Coimbra" 1923

These were not the only nations that had entered the field of commercial shipping. A case involving a government-owned vessel of Portugal came up before the German courts in May, 1923. The *Coimbra,* a former German vessel, delivered up to the Allies, apportioned to Portugal and owned by it at the time in question, rammed and sank an English vessel. Cadbury Brothers, owners of a cargo of sugar on the English ship, brought suit "against the steamer *Coimbra* represented by Captain Cardozo." March 6, 1923, they procured a decree of attachment from the Landgericht at Hamburg and seized the vessel. Later the designation of the defendant was made to read: "Captain Cardozo as commander of the steamer *Coimbra.*"

The order of attachment was affirmed by the Landgericht March 13, 1923, in conformity with the contention of the plaintiff that the Portuguese government had chartered the vessel to the National Navigation Co. of Lisbon, which was operating the vessel for its own account (in the sense of article 510 of the Commercial Code), and was therefore liable for the claims of ships' creditors.[2]

On April 7, 1923, the plaintiffs notified the court that the "main issue" was settled, for the Portuguese government, as owner of the *Coimbra,* had agreed to submit to the jurisdiction of the English courts for the decision of claims arising from the collision, and had given security for the execution of the

[1] See Compañia Mercantil Argentina *v.* U.S.S.B., 40 (1924), T.L.R., 601.

[2] Revue de Droit Maritime Comparé, IV (1923), 89; Hanseatische Rechtszeitschrift (1923), 376, No. 101.

judgment in England. The plaintiffs had therefore released the *Coimbra*.

The defendant, however, appealed to the Superior Court, whereupon the plaintiff argued that an appeal was not possible under the circumstances. This the court denied. It was obvious that the plaintiffs, in announcing that the "main issue" was settled, could have had reference only to the question of the seizure of the vessel, since the fundamental issue—claims arising from the collision—was to be settled by further process in the English courts. Although the process of attachment might have lost significance for the plaintiffs, since actually the vessel had been released and they had renounced any intention of rearresting it on the same order, nevertheless, the defendants, who had contended against the seizure from the beginning, were entitled to a decision on the legality of the order of attachment, even though at the present time it was no longer valid. For compensation might be claimed for damages arising from an illegal seizure.[1]

The question of the admissibility of the appeal being thus settled, the legality of the attachment was disposed of by the court in an interlocutory decree of May 30, 1923.[2] The ownership and the loss of the cargo were not contested, and it was established that the *Coimbra* was at least partially to blame for the collision, but the defendants claimed that, nevertheless, the seizure was not permissible because the vessel in question was the property of the Portuguese State.

The Court referred to the *Ice King* in which it had recognized the international-law principle that a foreign state could not be subjected to the jurisdiction of domestic courts even in private relations and had applied this rule to the case of a vessel owned by the United States, but engaged in commerce. It took occasion to mention that the criticisms of this decision were based not so much upon a different conception of the international-law principle involved, as upon considerations of opportunism which, however, could only have weight in connection with a future change in legal status. Nor could

[1] Zivilprozessordnung, § 945.

[2] Hanseatische Gerichtszeitung (1923), com., pt., p. 179; Hanseatische Rechtszeitschrift (1923), 498.

the court assume as did some that this principle of international law had been abolished, if it ever existed, by the development of international trade. For international law developed and changed, not according to the wishes of private interests affected by it, but through the unanimous will of the states in the family of nations. Such an expression of will regarding renunciation of immunity for state-owned merchant vessels did not exist; the attitude of the United States in the *Ice King,* and that of Portugal in the present case, was evidence to the contrary. Nor had there been time since the decision in the *Ice King* for a contrary practice to have established itself by custom which could have superseded this principle of international law.

Having thus indicated its position on the international-law point, the Court proceeded to deny that the principle was involved in the present case. It showed a tendency to follow the reasoning in the *West Chatala.* The Portuguese government, on account of the heavy losses it had incurred, had given up the direct operation of the German vessels it had taken. The *Coimbra* was turned over to the National Navigation Company on a bare-boat charter basis for a specified time. The government received only a definite charter rate per day. The company took care of all the equipping and maintenance, and made the freight contracts in its own name and for its own account. The bills of lading bore its name. Hence the company was proved to be the owner *pro hac vice,* in the sense of Article 510 of the Commercial Code.

However, the claim of the plaintiffs to the vessel, in their suit against the company, presupposed the existence of a maritime lien as a result of the collision. As it was not clear that Portuguese law—applicable under the circumstances—admitted such a lien for liability incurred by the captain as a result of a collision, the court granted time for the parties to bring in fresh evidence on this point.

On all the other points the objection to the seizure failed.

Attitude of German Shipowners

Whereas the German courts applied the principle of immunity in all its strictness even to government vessels engaged in commerce, since they conceived that such was the existing rule of international law, evidence was not lacking that the judges

themselves felt that such a rule no longer corresponded to the needs of the day. Not only did such expressions of opinion emanate from the bench, but they found advocates among merchants and shippers. The German Association of Maritime Law at the meeting of the *Comité Maritime International* at Gothenburg in 1923 subscribed to the draft convention that had been worked out by that body defining the liabilities of government-owned vessels and the method of enforcing them:

Draft Treaty of Comité Maritime International

The high contracting parties agree to subject to the rules laid down in this convention, the liability which may be incumbent upon them in relation to sea-going vessels owned by them and to cargoes carried by such vessels.

Article 1. Sea-going vessels owned or operated by sovereign states and cargo and passengers carried by such ships are subject to the same rules of liability and to the same obligations as those applicable to private shipowners owning or operating vessels of a like nature or to private owners of cargoes.

Article 2. For these liabilities and obligations, the competence of the tribunals and the rules of procedure, are the same as those applicable to privately owned merchant vessels or their cargoes.

Article 3. As an exception to the preceding provisions, the tribunals of each of the contracting states are alone competent in the case of

(a) Ships of war.

(b) Other sea-going vessels belonging to that state or employed by it engaged exclusively in governmental non-commercial work.

(c) State-owned cargoes carried for a purpose exclusively governmental and non-commercial on board government-owned or government-operated vessels. But the obligations and liabilities are the same as if the vessels or cargoes of this category belonged to a private owner.[1]

The German Association registered its interpretation of the last sentence of Article 3 as being applicable to war vessels and public vessels not used in commerce as well as to government-owned cargoes carried for exclusively governmental non-commercial purposes.[2]

[1] Translation by author from French text as appearing in *Comité Maritime International, Bulletin No. 64, Tableau Synoptique.*

[2] *Comité Maritime International, Bulletin No. 61,* p. 12.

Conclusion

The status accorded foreign sovereign princes, states and governments before the courts has been uniform in Germany for over a century and a quarter. Their immunity from jurisdiction has been conceded in practice even when they were especially designated as subject to arrest, as in the interpretation given the old Prussian enactment. In the early days in Prussia the sanctity of the foreign sovereign was declared by the ministers; under the empire, the courts themselves denied their competence in accordance with the well-recognized rule of international law. Not only did the attempt to provide explicitly for this immunity by an amendment to the Organic Law for the Judiciary fail in 1885, but subsequent events proved it unnecessary. The constitution of the German Republic of 1919 did expressly incorporate this rule of international law—together with all others—into the law of the land, but it has not served to alter the conclusions of the courts.

The principle of immunity has been broadly applied, and only the exceptions ordinarily allowed and prescribed by common sense have been admitted by the courts. Changing circumstances and opportunist demands have failed to move the judiciary. While not contributing to the development of international law on the point, the decisions have strengthened its sanctity. Through all sorts of external changes, the principle is applied to-day as it was a century ago.

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